Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In The Matter of	)	
	)	
Petition for Declaratory Ruling	)	CC Docket No. 98-62
To Declare Unlawful Certain RFP	)	
Practices by Ameritech	)	

COMMENTS OF E.SPIRE COMMUNICATIONS, INC. ON SPRINT'S PETITION FOR DECLARATORY RULING

e.spire Communications, Inc. ("e.spire") respectfully submits these comments, pursuant to the Commission's May 5, 1998 Public Notice in Docket No. 98-62, in support of the above-captioned Petition for a Declaratory Ruling that Ameritech's RFP Practices are Unlawful, filed by Sprint Communications Company, L.P. ("Sprint").

Statement of Interest

e.spire is a facilities-based CLEC that has been rapidly deploying local fiber optic networks throughout the United States. The company provides a broad array of advanced telecommunications services including data services and dedicated local services to businesses, and local switched voice services to business and residential customers. e.spire's facilities-based entry strategy consists of providing advanced telecommunications services through the use of unbundled local loops in combination with its own collocated equipment and digital SONET-based fiber optic local networks. e.spire has completed construction of local fiber networks in 32 markets and has 18 local exchange switches in operation.

e.spire's interest in supporting Sprint's Petition is based on its status as exactly the type of local exchange competitor that Sections 271 and 251(g) of the Telecommunications Act of 1996 ("1996 Act")[1] were designed to benefit. In combination, these sections require an ILEC to open its local exchange market to facilities-based competition before allowing it to enter the interLATA market. Yet Ameritech's recent Request for Proposals ("RFP") seeks entry into the interLATA market through a teaming arrangement with an interLATA carrier – with total disregard for the 1996 Act's mechanisms for opening the local exchange market. Allowing such teaming arrangements would dissolve the primary incentive the ILECs previously had for providing CLECs like e.spire with reasonable, non-discriminatory interconnection terms and conditions. e.spire, and other CLECs, would be stripped of their largest source of leverage for prying open the local market.

I. Failure to Declare the Ameritech RFP Practices Unlawful Would Vitiate the Single Most Effective Incentive for ILECs to Open Their Local Exchange Markets

The prohibition on BOC provision of interLATA services is the single most important tool for ensuring that a BOC's local exchange market is irreversibly open to competition before that BOC is allowed into the interLATA market. The Commission recognized as much in stating "[s]ection 271 thus creates a critically important incentive for BOCs to cooperate in introducing competition in their historically monopolized local telecommunications markets."[2] Such incentive is crucial since competitors will be incapable of providing "viable, broad-based local telecommunications service without interconnecting" with the BOC and in light of the unique situation of a CLEC which depends upon the BOC's cooperation in competing for the BOC's

1 Pub. L. No. 104-104, 110 Stat. 56 (1996).

2 *In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in*
(continued...)

customers.[3] The incentive of entry into the interLATA market lies in obtaining a piece of the long distance revenue pie, as well as the ability to offer "one-stop shopping" for local and long distance services. Unless and until the BOC creates equivalent access and support opportunities for local exchange services, it cannot enter the interLATA market.

Yet Ameritech's RFP seeks to gain the benefit of providing interLATA services without any regard for the status of competition in its local exchange markets. Ameritech believes it has hatched a scheme to obtain the quid without providing the quo. If allowed to do so, the practical effects are obvious. Ameritech will no longer have the incentive that constituted the driving force behind any efforts it has made to allow genuine competition in its local markets. Consequently, local competitors and potential local competitors will be left without the assistance of a critical tool provided by the 1996 Act. Acquiescence in Ameritech's plan will substantially delay opportunities for genuine local competition to develop. This result cannot be reconciled with either the overall pro-competitive goals of the 1996 Act or the rationale behind its specific sections concerning BOC provision of interLATA services.

II. The Practices Set Forth in Ameritech's RFP Amount to Unlawful Ameritech Provision of InterLATA Services

The 1996 Act clearly prohibits the arrangement contemplated in Ameritech's RFP. Ameritech essentially is seeking an underlying wholesale carrier from whom it can, for the moment, purchase necessary transmission capacity; almost all other indicia point to Ameritech as the service provider from whom end users would be obtaining interLATA service. There is

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Michigan, Memorandum Opinion and Order, CC Docket No. 97-137 (rel. August 19, 1997).

[3] *Id.*

simply no basis upon which Ameritech can provide in-region interLATA services this way without first obtaining approval pursuant to the standards set forth in Section 271(d).

Section 271(a) imposes a general ban on BOC provision of interLATA services. The section states, "[n]either a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section." 47 U.S.C. § 271(a). Because the interLATA services at issue consist of in-region services, the only potential source of authorization for Ameritech to provide interLATA service is found in section 271(d). However, the Commission already has determined Ameritech is far from satisfying the standards set forth in that section.[4]

The activity proposed in Ameritech's RFP unlawfully constitutes the provision of interLATA services by Ameritech. This was clear under the MFJ – which stated that a BOC may not "provide" interLATA service. In a 1986 decision, the United States District Court for the District of Columbia concluded that the MFJ "restrict[s] the [BOCs] not merely from providing transmissions from a point in one exchange area to a point in a different exchange area *but also from engaging in activities that comprise the business of providing interexchange services*."[5] Thus, the court rejected a BOC request (ironically, from Ameritech) to "engag[e] in

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4 Nor does Ameritech point to any other source of authority that might override the general prohibition contained in Section 271. Of course, this is not the first time an RBOC has attempted to provide interLATA services outside the framework established in Section 271. *See In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, Second Order on Reconsideration, CC Docket No. 96-149, 11 FCC Rcd 21905 (1997) (refusing to allow the explicit, general interLATA prohibition of 272(a) to be trumped by a strained interpretation of 272(e)(4)).

5 *Western Electric Co. v. U.S.*, 627 F.Supp. 1090, 1099-1100 (D.D.C. 1986), *aff'd in part and rev'd in part*, 797 F.2d 1082 (D.C. Cir. 1986) (emphasis added). As the court later summarized, the activities prohibited by the MFJ "are not limited to transmission, but in certain contexts include related activities such as interexchange traffic routing, the selection of interexchange carriers through least-cost routing or shared tenant services systems, and the *marketing of the services of interexchange carriers*." *Western Electric* (continued...)

activities that comprise the business of providing interexchange services."[6] The court expressed particular concern that the arrangement would involve Ameritech in three activities encompassed in the provision of an interLATA service (1) "the purchase of interexchange capacity on a wholesale basis (*i.e.*, at prices that reflect total demand in a particular context)"; (2) the marketing of services "based on comparisons of their particular rates, or mix of rates, with the rates of their competitors in the interexchange business"; and (3) "selecting carriers for their customers and procuring additional interexchange services for them."[7] Section 271, which, as applied to in-region interLATA services, contains the same operative language, incorporates the same definition of the "provision" of interLATA services.

Ameritech's contemplated involvement under the RFP is so extensive that it crosses far into the provision of interLATA services. For example, Ameritech seeks to exercise the right to select a particular IXC to carry interLATA traffic, after soliciting and comparing a variety of IXC bids. Ameritech's arrangement heavily involves it in the terms and conditions, pricing, and customer service functions of the prohibited service – all of which are functions integral to the provision of an interexchange service. Ameritech has told potential providers that to be considered for selection at all they must tailor their service offering to Ameritech's particular specifications. As noted in the Sprint Petition, "[t]he RFP commands the performance by the IXC of nearly one hundred service specifications, including ordering and provisioning standards, operator services criteria, billing and collection arrangements, legal and regulatory duties,

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(...continued)
Co. v. U.S., 673 F.Supp. 525, 540-41 n.69 (D.D.C. 1987) (citing 627 F. Supp. 1090) (emphasis added).

6 *Id.* at 1100.

7 *Id.* at 1100-02.

network technical requirements, etc."[8] Ameritech thus assumes a substantial role in prescribing the terms and conditions of the interLATA service.

In addition, Ameritech replaces the IXC as the point of contact for its customers. The RFP reserves for Ameritech the role of "the originating point of all customer service for customers . . ."[9] In practical effect, Ameritech, not the IXC, will be positioned in the customer's eyes as the service provider. If a customer wishes to discuss his or her interLATA service, it must call Ameritech.

Perhaps the boldest and most abusive feature of Ameritech's extension into the provision of interLATA service is its proposed role in pricing. Ameritech's RFP sets forth detailed pricing requirements, including a cap on the IXC's retail rate and a list of particular charges that must be included in those rates. The RFP goes even further to prohibit the selected IXC from changing its rates without prior Ameritech approval.[10] This strict pricing criteria for the IXCs competing to win Ameritech's selection, together with their inability to change prices without prior Ameritech consent, amounts to much more than merely being intertwined with the interLATA service provider. Ameritech will review, compare, select, and lock-in the prices and pricing structure of its chosen interLATA carrier. Indeed, as the "rate setting IXC" in this arrangement, Ameritech would be required under the FCC's slamming rules to be listed on the LOA.[11] Such involvement underscores the true nature of the RFP's proposal – to allow Ameritech to provide interLATA services to customers in its region, on terms and conditions of Ameritech's choosing.

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[8] Sprint Petition at 4.

[9] Ameritech RFP at 8.

[10] Ameritech RFP at 5, 8.

[11] 47 C.F.R. § 64.1150.

That is the essence of the provision of interLATA service, which Ameritech is prohibited from providing unless it satisfies Section 271.

Presumably, Ameritech seeks protection through a claim that the statute permits "marketing" of interLATA services. But Section 271 provides no authorization for "marketing" of interLATA services, and its structure supports the proposition that Congress considered any marketing activity to be permissible only *after* a BOC satisfies Section 271(d)'s standard. Indeed, the avoided cost standard for resale services recognizes that marketing is part and parcel of the provision of service. Therefore, marketing is included as an avoided cost in the price of resale service. If Congress had any intention to allow the BOCs to provide interLATA services through the type of marketing arrangement described in the RFP, it knew how to demonstrate such an intention. For example, in Section 274, Congress set out rules for BOC provision of electronic publishing services. There, the Act allows a "teaming arrangement" with an electronic publisher (including an affiliate), but only upon explicit conditions restricting the scope of the BOC's involvement in the teaming arrangement. 47 U.S.C. §274(c). No analogous provision authorizing interLATA "teaming arrangements" is contained in Section 271. Congress' choice not to include a provision authorizing a teaming arrangement for interLATA services was deliberate and supported by sound reason. Thus, a "teaming arrangement" is not one of the methods provided for in Section 271 to overcome Section 271(a)'s general prohibition on BOC provision of interLATA service.

III. Even if Some Involvement in Marketing Were Permissible, the Practices Set Forth in Ameritech's RFP Are Unlawful

Because the Act does not permit Ameritech to select interLATA carriers and market interLATA services, there are no standards for such a practice. Nevertheless, even where the Commission has authorized BOC marketing in other, non-controlling contexts, it has prohibited the types of practices Ameritech proposes in its RFP. Therefore, even if some form of marketing were permissible, Ameritech's RFP would be unlawful.

To e.spire's knowledge, the only other instance where the Commission has authorized BOC marketing of a prohibited service is in the context of alarm monitoring services.[12] Interpreting Section 275's alarm monitoring restriction, the Commission prohibited BOC "sales agency" arrangements in which the BOC's "interests are so intertwined with the interests of [its chosen partner] that the BOC itself may be considered to be engaged in the provision of" the prohibited services itself.[13] A variety of factors are to be considered in such a review, but the Commission specifically found two factors most significant. The first factor is straightforward: "whether the terms and conditions of the sales agency and marketing arrangement are made available to other . . . companies on a nondiscriminatory basis."[14] The second factor involves how a BOC is compensated in the arrangement. According to the Commission, compensation arrangements in which the BOC has "a financial stake in the commercial success" of the chosen partner amount to BOC provision of the prohibited service.[15]

Ameritech's RFP describes a marketing arrangement that fails both factors specifically noted in the Alarm Monitoring Order. First, the RFP violates the nondiscrimination requirement. The nature of the RFP process itself ensures that only one interLATA carrier – the successful bidder – will enjoy the benefits of partnering with Ameritech. Indeed, the competitive bidding process in the RFP is designed exclude, round by round, more and more proposed service

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12 *In the Matter of Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, Second Report and Order, CC Docket No. 96-152, 12 FCC Rcd 3824 (1997) (*Alarm Monitoring Order), petition for review pending sub nom. Alarm Industry Communications Committee v. FCC*, (D.C.Cir.).

13 *Id.* at ¶38.

14 *Id.* at ¶38.

offerings, and thus more and more service providers. The successful bidder's particular offering may eventually be made available to all takers, but by then the offering is so lop-sided in Ameritech's favor as to effectively prevent most providers from seeking it. Clearly the RFP function of singling out of a single company's service offering, to the practical exclusion of other eligible and interested companies, violates the Commission's prerequisite that the terms and conditions of such an agreement be "available to other [companies] on a nondiscriminatory basis."[16]

Ameritech's RFP also fails under the Commission's BOC compensation requirements. The RFP, by its own terms, establishes exactly what the Commission prohibited in the Alarm Monitoring Order – Ameritech will have a direct "financial stake in the commercial success" of the IXC that it teams up with. Ameritech will receive compensation based directly on the volume of traffic carried by the IXC. Traffic volume, of course, equals IXC revenues which equals the commercial success of the IXC. Moreover, basing the BOC's compensation directly on the revenues of the partnering provider was identified by the Commission as exactly the sort of arrangement that would constitute unlawful provision.[17] Ameritech contends that the $.03 per minute surcharge on all traffic carried by the IXC is purportedly designed to recover Ameritech's marketing expenses. However, the compensation is directly linked to traffic volume, and thus traffic revenues, rather than, for example, one-time or flat-rate commissions based on a genuine measure of Ameritech's marketing expenses. Under the RFP, Ameritech will be compensated for interLATA services in lock-step with interLATA minutes of use, much like all IXCs.

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15 *Id.* at ¶39.

16 *Id.* at ¶38.

17 *Id.* at ¶39.

Thus, the Commission may summarily declare Ameritech's RFP unlawful, without need to reach the question of whether some marketing might be permissible under the Act.

Conclusion

For the foregoing reasons, the Commission should grant Sprint's Petition and issue a Declaratory Ruling that Ameritech's RFP practices are unlawful.

Respectfully submitted,

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